IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JEFF PATTERSON,

Plaintiff,

v.

TURINA BAKKEN, MELISSA BRAINERD, and CYNTHIA PECKENPAUGH,

Defendants.

OPINION AND ORDER

12-cv-706-wmc

In this civil rights action, plaintiff Jeff Patterson alleges that the named defendants, all employees of Madison Area Technical College, refused to hire him as a salon manager on the basis of his race and/or sex. Before the court is defendants' motion to dismiss plaintiff's claims pursuant to Federal Rules of Civil Procedure 8 and 12(b)(6). (Dkt. #17) Because the court finds that plaintiff's allegations are sufficient to state claims for race discrimination under 42 U.S.C. § 1981 and both race and sex discrimination under the Equal Protection Clause, the court will deny defendants' motion. Also before the court is plaintiff's motion to file a second amended complaint (dkt. #26) and defendants' motion to strike the second amended complaint (dkt. #20). For the reasons that follow, the court will grant plaintiff's motion for leave to amend and deny defendant's motion to strike.

ALLEGATIONS OF FACT[1]

Plaintiff Jeff Patterson alleges that defendants discriminated against him on the basis of his sex and/or race when they failed to hire him as the "Salon Manager" at Madison Area Technical College ("Madison College") in violation of the Equal Protection Clause of the Fourteenth Amendment (race and sex) and 42 U.S.C. § 1981 (race only). Patterson is an African-American man. The three defendants, all white women employed by Madison College, are alleged to have acted under color of law and in their individual capacities.

In the summer of 2010, Madison College was seeking to fill the position of Salon Manager. The position required a bachelor's degree. Patterson was a candidate for the position, and was qualified to fill the position, in part because he has a bachelor's degree.

Defendants Melissa Brainerd and Cynthia Peckenpaugh, and a third individual, John Fahey, were responsible for the initial applicant screening. Brainerd, Peckenpaugh and Fahey performed interviews and reviewed application materials. On July 6, 2010, Peckenpaugh and Brainerd recommended to Associate Dean Dennis Baskin that Barb Arnold, a white woman, be hired as the Salon Manager.

Patterson alleges that Peckenpaugh and Brainerd made this recommendation with the knowledge that (1) Arnold lacked the minimum qualification of a bachelor's degree and (2) Patterson possessed that qualification. Patterson also alleges that Peckenpaugh

[1] For the reasons explained below (*see* Opinion, *infra,* Part I.), the court has considered defendants' motion in light of the allegations contained in plaintiff's second amended complaint. The court accepts as true all well-pleaded facts and allegations in the complaint, drawing all reasonable inferences in favor of the plaintiffs. *London v. RBS Citizens, N.A.*, 600 F.3d 742, 745 (7th Cir. 2010).

and Brainerd "knew the race and gender of each of the applicants because they reviewed information pertaining to each of the applicants, and/or had prior experience with the applicants." (*Id.* at ¶ 16.) In making the recommendation, plaintiff alleges that "Peckenpaugh and Brainerd intentionally discriminated against Patterson because of his race and / or his sex because they knew their recommendation was very likely to lead to Arnold's hiring." (*Id.* at ¶ 21.)

Associate Dean Baskin is not named as a defendant, but informed his supervisor, defendant Turina Bakken (allegedly the ultimate decision-maker), of Peckenpaugh and Brainer's recommendation of Arnold. In passing this information along, Baskin "stated that he disagreed with the recommendation, and that he thought [Madison College] should hire Patterson as the Salon Manager." (*Id.* at ¶ 23.) Baskin also informed Bakken that Fahey (the third member of the team) "indicated to Baskin that he (Fahey) suspected race played a factor in Peckenpaugh and Brainerd recommending Arnold over Patterson." (*Id.* at 24.) Baskin pointed out to Bakken that Patterson was African American and male, while Arnold, Peckenpaugh and Brainerd were all white and female. Finally, Baskin informed Bakken that Patterson had a bachelor's degree, but that Arnold did not. (Plaintiff also alleges that "Bakken had worked in the proximity of Patterson from time to time," and "knew that Patterson was African American and male." (*Id.* at ¶ 15.))

Despite Baskin's report to Bakken, she allegedly "ordered Baskin to hire Arnold." (*Id.* at ¶ 25.) Patterson alleges that "Bakken intentionally discriminated against Patterson on the basis of his race and/or sex when she decided to hire Arnold over

Patterson," or, in the alternative, she was "motivated by Peckenpaugh and Brainerd's recommendation to hire Arnold." (*Id.* at ¶¶ 26-27.) On August 2, 2012, Madison College offered Arnold the Salon Manager position, which she accepted.

OPINION

I. Motion to Strike and Motion to Amend Complaint

Before turning to the motion to dismiss, defendants challenge which of plaintiff's complaints is the operative pleading. Patterson filed his original complaint on September 26, 2012. (Dkt. #1.) Defendants responded with motions to dismiss. (Dkt. ##7, 9.) On February 8, 2013, plaintiff filed an amended complaint, mooting defendants' motions to dismiss. (Dkt. #15.) In response, Patterson filed the motion to dismiss pending before the court. (Dkt. #17.) Less than a week later, on February 28, 2013, plaintiff filed a second amended complaint. (Dkt. #19.) Defendants moved to strike the complaint or, in the alternative, sought clarification of the court's preliminary pretrial conference order. (Dkt. #20.) Judge Crocker responded to the motion for clarification, indicating that "the court intended to allow each party to amend its pleadings *once* within the stated deadline without seeking leave of court." (3/11/13 Order (dkt. #24) (emphasis added).) Plaintiff subsequently filed a motion for leave to file the (already filed) second amended complaint. (Dkt. #26.)

The court is sympathetic to defendants' position. Defendants' motions to dismiss are being met with amended pleadings, presenting defendants with a moving target and frustrating their efforts to dispose of plaintiff's claims as early in the case as possible. At

the same time, this case is still in an early phase -- dispositive motions are not due until September, and likely little, if any, discovery has taken place to date. While plaintiff could have -- and probably should have -- been more mindful of the facts necessary to support his legal theories in the initial round of pleading, and certainly as part of his first amended complaint, the court does not find his delay in filing a second amended complaint -- which was filed prior to the deadline set in the preliminary pretrial conference order for amended pleadings -- prejudiced defendants, other than the typical consequence of an amended pleading mooting a previously-filed motion to dismiss.

Accordingly, the court will deny defendants' motion to strike and grant plaintiff leave to file his second amended complaint. To ameliorate any prejudice to defendants, the court will also consider defendants' second motion to dismiss in light of the second amended complaint, and will not require defendants to re-file their motion once again. The court will also grant defendants leave to file a second motion to dismiss to address any additional grounds specific to the second amended complaint, and which could not have been raised in response to the first amended complaint. That motion, if any, is due on or before July 18th.[2] Should a second motion to dismiss be timely filed, plaintiff shall have 14 days *from filing* to respond. No reply will be allowed absent leave of court.

[2] Of course, defendants could also raise any additional challenges in a motion for summary judgment.

II. Motion to Dismiss

Defendants move to dismiss plaintiff's claims for race and sex discrimination pursuant to the Equal Protection Clause as legally deficient under Fed. R. Civ. P. 8 and 12(b)(6). Rule 8 requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although detailed factual allegations are not required, mere "labels and conclusions, or a formulaic recitation of the elements of a cause of action" are not sufficient to survive a motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Riley v. Vilsack*, 665 F. Supp. 2d 994, 997 (W.D. Wis. 2009) (holding that the plaintiff need not provide detailed factual allegations, but must provide "just enough facts to raise [the claim] above the level of mere speculation").

Even if plaintiff's allegations are sufficient to place defendants on notice, the allegations must also state a claim upon which relief may be granted. Under Rule 12(b)(6), a complaint must contain sufficient factual matter which, if accepted as true, states a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (quoting *Twombly*, 550 U.S. at 570). It is not enough to "plead facts that are 'merely consistent with' a defendant's liability." *Iqbal*, 556 U.S. at 678. Under this standard, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556); *McCauley v. City of Chi.*, 651 F.3d 611, 615 (7th Cir. 2011) (following the plausibility standard articulated in *Iqbal*

and *Twombly*). With these standards in mind, the court will turn to plaintiff's discrimination claims.

A. Race Discrimination

Plaintiff alleges that defendants intentionally discriminated against him based on his race (African American) in violation of 42 U.S.C. § 1981 and the Equal Protection Clause of the Fourteenth Amendment.[3] For the purposes of pleading intentional discrimination, the court applies the same analysis to both of these claims. *See, e.g.*, *Franklin v. City of Evanston*, 384 F.3d 838, 848 (7th Cir. 2004) ("[E]qual protection claims and § 1981 claims are analyzed using the same framework."). These claims also share the same framework with Title VII claims. *Radentz v. Marion Cnty.*, 640 F.3d 754, 757 (7th Cir. 2011) ("Our cases make clear that the same standards for proving intentional discrimination apply to Title VII and § 1983 equal protection." (internal citation and quotation marks omitted)); *see also Burnell v. Gates Rubber Co.*, 647 F.3d 704, 708 (7th Cir. 2011) (applying same analysis to Title VII and § 1981 claim).

In *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010), the court considered the pleading requirements for an intentional discrimination claim in a post-*Twombly* and *Iqbal* world. In reversing the district court's order dismissing a racial discrimination claim under the Fair Housing Act, 42 U.S.C. § 3605, the Seventh Circuit found allegations in the complaint sufficient to meet the pleading requirements of Rule 8. 614 F.3d at 405-06. In so holding, the court explained:

[3] The latter claim is in-turn pursuant to 42 U.S.C. § 1983.

> Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan). *This is all that she needed in the complaint*.

Id. at 405 (citing *Swierkiewicz v. Soerma N.A.*, 534 U.S. 506, 511-12 (2002)) (emphasis added).[4]

So, too, here. Patterson alleges the type of discrimination that he believes occurred (race and sex), by whom (Bakken in her role as the final hiring decisionmaker

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[4] In *Swierkiewicz*, the United States Supreme Court also rejected the Second Circuit's requirement that an employment discrimination claim proceeding under the indirect or *McDonnell Douglas* framework contain *specific* facts establishing a prima facie case under that method of proof. 534 U.S. at 511. In so holding, the Court reiterated that Rule 8(a)'s pleading standards apply to all civil actions. *Id.* at 513. Without support, defendants imply that the Supreme Court's holding in *Swierkiewicz* is no longer good law. (Defs.' Reply (dkt. #30) ("*Swierkiewicz* and *Twombly/Iqbal* have been reconciled -- *Swierkiewicz* rejected a heightened pleading standard for employment cases, then *Twombly* and *Iqbal* raised the bar for complaints across the board."). Unfortunately for defendants, this simplistic description is at odds with the Seventh Circuit's discussion of the interplay between *Swierkiewicz* and *Iqbal* / *Twombly*:

> The Supreme Court's explicit decision to reaffirm the validity of *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002), which was cited with approval in *Twombly,* 550 U.S. at 556, 127 S. Ct. 1955, indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions. A plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else. That is an entirely plausible scenario, whether or not it describes what "really" went on in this plaintiff's case.

Swanson, 614 F.3d at 404-05; *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (noting that "the Supreme Court has recently reaffirmed, *Swierkiewicz v. Sorema N.A.*").

and Peckenpaugh and Brainerd, in their roles as applicant screeners and recommenders), and when (in connection with his application for Salon Manager during the summer of 2010). Just as in *Swanson*, this is a "straightforward" intentional discrimination complaint, and nothing more is needed. 614 F.3d 404 (contrasting "straightforward" discrimination claims with "more complex case[s] involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations," which "will require more detail" after *Twombly* and *Iqbal*); *McCauley*, 671 F.3d at 617 (explaining that "uncomplicated" discrimination claims simply need to contain factual allegations identifying "(1) who discriminated against her; (2) the type of discrimination that occurred; and (3) when the discrimination took place").

Nor has Patterson effectively plead himself out of a claim for relief by alleging facts that "give right to an 'obvious alternative explanation,'" causing the complaint to "fall short" of the plausibility line. *McCauley v. City of Chi.*, 671 F.3d 611, (7th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 682; *Twombly*, 550 U.S. at 557, 567); *see also Brooks v. Ross*, 578 F.3d 574, 578 (7th Cir. 2009) (affirming dismissal of conspiracy claim where allegations considered of "nothing more" than a "formulaic recitation of the cause of action" and where the allegations were "just as consistent with lawful conduct as . . . with wrongdoing"). Indeed, Patterson's additional factual allegations -- that other individuals involved in the hiring process expressed suspicions that race may have been a factor in the screening process *and* that the person selected for the position was not qualified -- are sufficient to clear a plausibility threshold.

In response to defendants' motion to dismiss, plaintiff contends that he has adequately plead a prima facie case under the indirect or *McDonnell Douglas* framework for demonstrating intentional discrimination claims. (Pl.'s Opp'n (dkt. #25) 6 (describing four elements of a failure to hire case and citing *Stockwell v. City of Harvey*, 597 F.3d 895, 901 (7th Cir. 2010)).) Specifically, the complaint alleges (1) Patterson is a member of a protected class; (2) he was qualified for the position of Salon Manager; (3) he was rejected; and (4) the position was given to a person outside of his protected class who was similarly or less qualified than him. (*Id.*) While the Supreme Court held in *Swierkiewicz*, a "prima facie case under *McDonnell Douglas* is an evidentiary standard, not a pleading requirement," 534 U.S. at 510, the fact that Patterson's allegations are sufficient to support a prima facie case under the indirect method provides an additional basis for denying defendants' motion to dismiss.

Defendants also contend that the allegations in the complaint against defendants Peckenpaugh and Brainerd are insufficient to meet the "personal involvement" requirement for liability under either § 1981 or § 1983. *See Smith v. Bray*, 681 F.3d 888, 899 (7th Cir. 2012) ("As with § 1981, individual liability under § 1983 is appropriate where the 'individual defendant caused or participated in a constitutional deprivation.'") (quoting *Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1039 (7th Cir. 2003)). While the complaint alleges that Bakken, not Peckenpaugh nor Brainerd, made the final decision to hire Arnold over a more qualified Patterson, one need not be the ultimate decisionmaker to have "participated in" the alleged discrimination.

The complaint alleges that Peckenpaugh and Brainerd were tasked with screening applications and recommending an individual for hire. In that capacity, Peckenpaugh and Brainerd allegedly passed over Patterson because of his race and/or sex. As the court understands plaintiff's complaint, Peckenpaugh and Brainerd recommended and passed along Arnold's application for hire, thus foreclosing Bakken's review of other candidates. Based on these allegations, these defendants "participated in" the alleged discrimination, sufficient to meet the personal involvement or responsibility requirement. *See, e.g.*, *Hildebrandt*, 347 F.3d at 1039 (finding sufficient evidence to survive summary judgment that individual defendant "participated in" gender discrimination by reviewing performance evaluations and salary data to support § 1983 personal involvement requirement).[5]

In the alternative, plaintiff attempts to pursue a muddled "cat's paw" theory. (2d Am. Compl. (dkt. #19) ¶ 27 ("Alternatively, Bakken was motivated by Peckenpaugh['s] and Brainerd's recommendation to hire Arnold in coming to her decision to hire Arnold over Patterson.").) "In employment discrimination law the 'cat's paw' metaphor refers to a situation in which an employees is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who

[5] Defendants point to a Northern District of Illinois opinion where the court dismissed certain defendants who allegedly "joined in support" of the plaintiff's termination decision because the complaint failed to allege personal involvement on their part as required under § 1981. (Defs.' Opening Br. (dkt. #18) 8-9 (citing *Jones v. SABIS Educ. Sys.*, 52 F. Supp. 2d 868, 877 (N.D. Ill. 1999)).) Even if this opinion were authoritative, the allegations here are distinguishable from those in *Jones*. Patterson alleges that Peckenpaugh and Brainerd screened the applications and recommended Arnold for the position because of alleged discriminatory animus. As such, they actively participated in the alleged discrimination and were not mere passive supporters.

has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action." *Cook v. IPC Int'l Corp.*, 673 F.3d 625, 628 (7th Cir. 2012). As defendants explain, the application of the cat's paw theory appears stretched here, in light of plaintiff's allegation that Bakken knew of the alleged racism underlying Peckenpaugh and Brainerd's recommendation, but still opted to extend the offer to Arnold over Patterson. Nor is this theory necessary -- at least at the pleading stage -- where plaintiff alleges that Bakken and Peckenpaugh participated in the hiring decision by recommending Arnold for the position allegedly because of Patterson's race or sex.

Finally, defendants challenge plaintiff's allegation that defendants were aware of Patterson's race, a necessary element of an intentional discrimination claim. *See Pressley v. Haeger*, 977 F.2d 295, 297 (7th Cir. 1992) ("Haeger could not discriminate against Pressley on account of race if he did not know Pressley's race."). On the contrary, the complaint alleges that Peckenpaugh and Brainerd were aware of Patterson's race and gender as an applicant "because they reviewed information pertaining to each of the applicants, and/or had prior experience with the applicants." (2d Am. Compl. (dkt. #19) ¶ 16.) Without knowing what information was in plaintiff's application, it is difficult to determine whether the application put Peckenpaugh and Brainerd on notice of Patterson's race, but this issue is for another day.

The complaint also alleges that Peckenpaugh and Brainerd had "prior experience with the applicants," and it is a reasonable inference that they had prior experience with Patterson specifically in light of the complaint's allegation that Patterson "had performed

work at [Madison College] prior to his application for the Salon Manager position." (2d Am. Compl. (dkt. #19) ¶ 15.)[6] The fact that, as alleged, Fahey and Baskin were both aware of Patterson's race further supports an inference that Peckenpaugh and Brainerd were aware at the time they were reviewed applications that Patterson was African American. The complaint also alleges that Bakken knew Patterson was African-American and male because "Bakken had worked in the proximity of Patterson from time to time." (*Id.* at ¶ 15.) This allegation, coupled with the allegation that Baskin informed Bakken of his and Fahey's concern about race discrimination, is sufficient to plead that Bakken had knowledge of Patterson's race to form a basis for Patterson's race discrimination claim.[7]

B. Sex Discrimination

The court's discussion above with respect to plaintiff's race discrimination claim resolves most of the challenges defendants pose to plaintiff's sex discrimination claim, with two exceptions. *First*, defendants contend that because Patterson is a male, and

[6] Even if it did not, there is also still the allegation that the initial application process included interviews of the applicants.

[7] Defendants also take issue with the lack of any allegation that defendants knew "Plaintiff's or Arnold's gender." (Defs.' Opening Br. (dkt. #18) 11.) This argument warrants little discussion. Since neither name is gender neutral -- "Jeff" is a traditional male name and "Barb" is a traditional female name --, it is reasonable to infer that defendants were aware of Patterson's and Arnold's respective genders at the time of the hiring decision. *See* "Geoffrey," Wikipedia, http://en.wikipedia.org/wiki/Geoffrey_(given_name) (last visited June 18, 2013) ("'Geoffrey', often spelled Jeffrey and abbreviated as 'Geoff' or 'Jeff' or 'Geof', is a *male* given name in the English-speaking world." (emphasis added)); "Barbara," Wikipedia, http://en.wikipedia.org/wiki/Barbara_(given_name) (last visited June 18, 2013) (Barbara is a *female* given name used in numerous languages." (emphasis added)).

therefore a member of the "majority" with respect to his gender, Patterson's sex discrimination claim is a reverse discrimination claim. As such, he must allege so-called "'background circumstances' that show that the employer discriminated against the majority, or he must show there is something 'fishy' going on." *Farr v. St. Francis Hosp. Health Ctrs.*, 570 F.3d 829, 833 (7th Cir. 2009).

Plaintiff takes issue with this categorization of his claim since he "is not claiming that members of his own gender discriminated against him." (Pl.'s Opp'n (dkt. #25) 11.) Plaintiff offers no support for this further gloss on the definition of "reverse discrimination," nor is the court aware of any. To the contrary, a reverse discrimination claim does not hinge on whether the alleged discriminators are the same sex as the plaintiff; rather, it is the plaintiff's lack of membership in a protected class which triggers the claim. Still, context matters: in certain circumstances, discrimination against a member of the majority may be more common. *See Timm v. Ill. Dep't of Corr.*, No. 07-3697, 335 Fed. Appx. 637, 642, 2009 WL 1845641, at *4 (7th Cir. June 29, 2009) (finding background circumstances element met plaintiff's allegation that he was terminated as an employee at a women's prison); *Hague v. Thompson Distrib. Co.,* 436 F.3d 816, 820-22 (7th Cir. 2006) (finding background circumstances met where it would be "not surprising" for such discrimination to occur). At this stage in the case, the court cannot -- and need not -- determine whether a Salon Manager is traditionally a role filled by a woman; but drawing all reasonable inferences in plaintiff's favor at this early stage of

the litigation, the court finds that plaintiff has alleged sufficient background circumstances to support his reverse sex discrimination claim.[8]

Second, unlike the allegations of race discrimination, defendants argue that "[t]here is no allegation that any of the Defendants made discriminatory statements -- or *any* statements, for that matter -- related to Plaintiff's (or Arnold's) gender. (Defs.' Opening Br. (dkt. #18) 11.) This supposed defect also misses the mark, since such overt statements are not required to prove discrimination, much less required at the pleading stage. *See Dickerson v. Bd. of Trs. of Cmty. Coll. Dist. No. 522*, 657 F.3d 595, 601 (7th Cir. 2011) ("[E]mployers are usually careful not to offer overt remarks revealing discrimination, and circumstantial evidence that allows a jury to infer intentional discrimination is also permissible."). For the reasons provided above in discussing the

[8] While not relied upon by plaintiff, his claim of discrimination could also be construed as a "hybrid" or "intersectional" claim (*i.e.*, "sex-plus" or "race-plus" some other characteristic). *See Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (holding that "discrimination against black females can exist even in the absence of discrimination against black men or white women"); *Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 769-71 (E.D. Wis. 2010) (holding that African American male plaintiff may bring a claim of discrimination based on "combination of race and gender"). To date, the Seventh Circuit has declined to decide whether to recognize such a claim. *See Coffman v. Indianapolis Fire Dep't*, 578 F.3d 559, 563-64 (7th Cir. 2009) (noting that "[w]e have not yet decided in this circuit whether we recognize a 'sex-plus' theory of discrimination" and declining to decide this issue given the plaintiff's showing) (citing *Logan v. Kautex Textron No. Am.*, 259 F.3d 635, 638 n.2 (7th Cir. 2001)). In practice, however, the court has analyzed a discrimination claim based on two characteristics, even if not labeling it as "hybrid" or "sex-plus" or "race-plus" claim. *See Goodwin v. Bd. of Trustees of Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir. 2006) (describing the plaintiff as a "black female" and analyzing her claim as such). Since the allegations are sufficient to support background circumstances, the court does not, and need not, decide today whether plaintiff could bring such a claim here.

adequacy of plaintiff's race discrimination allegations, the court similarly finds plaintiff's sex discrimination claim sufficient for pleading purposes.

In aggressively pursuing a motion to dismiss, defendants likely are concerned about the "asymmetric discovery burdens and the potential for extortionate litigation" described by Judge Posner in his dissent in *Swanson*, 614 F.3d at 411. These practices are of concern to the court as well, but the remedy is not the early dismissal of a complaint that contains allegations adequate to make out a claim of intentional discrimination. The burden on defendants to comply with discovery demands must be weighed against the difficulty in proving hidden discrimination. *See Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) ("A strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared."). To address defendants' concerns about discovery, the court is prepared in this case, as always, to limit discovery, if it is shown to be unreasonably burdensome or unlikely to lead to the discovery of admissible evidence. To that end, all discovery-related motions in this case will be called to my attention going forward.

ORDER

IT IS ORDERED that:

1) Defendants Turina Bakken, Melissa Brainerd, and Cynthia Peckenpaugh's motion to dismiss (dkt. #17) is DENIED without prejudice to defendants filing a motion to dismiss the second amended complaint as provided above in the opinion on or before July 18, 2013;

2) Defendants' motion to strike the second amended complaint (dkt. #20) is DENIED;

3) Plaintiff Jeff Patterson's motion to amend complaint (dkt. #26) is GRANTED. The operative pleading is the second amended complaint (dkt. #19); and

4) The clerk's office should direct all discovery-related motions to Judge Conley for his consideration.

Entered this 18th day of June, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge